No. 83-903

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In The

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

-vs-

GABRIEL BRIGUGLIO,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEVEN H. GIFIS
ALAN DEXTER BOWMAN
20 Nassau Street, Suite 203
Princeton, New Jersey 08542
(609) 921-0413

Attorneys for Petitioner

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 363
Cranbury, N.J. 08512
Area Code 609
443-4202

Questions Presented

1. Whether an Attorney's Knowing Status As The Target Of A Federal Grand Jury Investigation In The Same Federal District As the Criminal Trial Is An Actual Conflict Which Must Be Disclosed to The Client.

2. Whether In Light Of Cuyler v. Sullivan, a Multiple Representation Case, A Criminal Defendant Seeking A New Trial On Appeal Because Of His Trial Counsel's Previously Unobjected To, Concealed Personal Conflict Must Demonstrate That The Conflict Adversely Affected The Representation.

3. Whether a Prosecutor Has A Duty To Disclose To The Court That Trial Counsel Is A Target Of An Investigation By the Prosecutor's Office And Concomitantly Whether the Trial Court Upon Being Informed Has A Duty To Inquire As To Whether The Conflict And Potential for intimidation Have Been Disclosed To The Defendant.

4. Whether The Decision Of The Prosecutor Not to Engage In Particular Plea Negotiations With Counsel Due To His Status Gave Rise To An Actual Conflict Which Adversely Affected The Representation Afforded Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

VS.

GABRIEL BRIGUGLIO,

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 17 , 1983.

Opinion Below

The Judgement Order Of the United States Court Of Appeals for the Third Circuit is appended to this Petition as Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court to review the Final Judgment of the United States Court of Appeals for the Third Circuit is based on 28 U.S.C. §1254)

Constitution, Statutory And Rule Provisions Involved

Petitioner seeks review of issues of law arising under the Fifth and Sixth Amendments to the United States Constitution. They are appended to this Petition as Appendix B.

STATEMENT OF THE CASE

a. Factual Background

In February of 1979, Thomas DiBiasi assumed representation of petitioner in a federal criminal matter in the district of New Jersey. (T.6-1 to 3). Thereafter, in March of 1979 DiBiasi was issued a subpoena duces tecum to appear and produce documents before a federal grand jury in the district of New Jersey. (T.247-2 to 10). DiBiasi traveled to the federal courthouse on April 10, 1979 in possession of documents with the intention to testify. (T.247-22 to 248-8). Upon his arrival, DiBiasi was informed by Assistant United States Attorney Richard Friedman that he might want to reconsider his decision to testify. The basis for Friedman's statement was the necessity that he warn DiBiasi

that he (DiBiasi) was a target of the grand jury. (T.247-22 to 248-8). In response, DiBiasi gave Friedman the documents covered by the subpeona and decided against testifying. (T.248-11 to 15; T.265-20 to 21).

Friedman informed Jeffrey Speiser, the trial prosecutor, that DiBiasi had been advised that he was a target of a federal grand jury investigation in the same district as trial. Speiser did not at this point inform the court of DiBiasi's status. (T.1136-12 to 21; T.138-14 to 13). Trial commenced on May 7, 1979. One week later, on a day in which trial was continuing, DiBiasi telephoned Friedman to arrange an appointment to see him. (T.251-4 to 7). The purpose of the meeting was to discuss DiBiasi's status within the ongoing investigation. (T.251-5 to 7). Friedman informed DiBiasi that no action would be taken by the grand jury until after petitioner's trial. At that time, DiBiasi would be permitted to present evidence to the grand jury. (T.251-9 to 13).

At other points during the trial, DiBiasi manifested further concern and anxiety respecting his status within the investigation. He approached Speiser and stated that he (DiBiasi) particularly understood the stress under which the defendants were laboring at trial because he too was an adversary of the government in his personal capacity.

DiBiasi then indicated that he was aware that Speiser knew of his status. (T.204-19 to 205-1). Similarly, DiBiasi intimated to petitioner's wife that he understood her anxiety and that of her family because he too might soon be indicted. However, DiBiasi retracted that comment stating that he was joking. (T.275-5 to 12; T.277-4 to 6). This last comment was in response to an inquiry by petitioner's wife as to whether counsel might be experiencing personal problems which were causing a clear dimunition of his zeal.

Although evidence was adduced which could be viewed as implicating petitioner in the conspiracy, particularly two checks and a letter written by petitioner's brother to the government's chief witness, DiBiasi did not present any defense in petitioner's behalf. Petitioner, who had no prior criminal record, was dissuaded from testifying on the basis of erroneous legal advice and assurances that insufficient evidence had been adduced to convict him. DiBiasi incorrectly advised petitioner that questions could be posited to him respecting the disappearance of Jimmy Hoffa. Similarly, no character witnesses were adduced allegedly because of the same fear. (T.296-10 to 300-3; T.79-7 to 10). No ruling was sought from the court respecting the admissibility of any questions concerning the unsolved disappearance of Jimmy Hoffa.

During jury deliberations, DiBiasi requested that plea negotiations be conducted in the court's chambers, in the presence of the court. (T.49-10 to 15). Such negotiations were inconsistent with assurances made to petitioner that there was insufficient evidence to convict him. DiBiasi sought an agreement from the government to accept a plea without an acknowledgement of guilt. These negotiations terminated without an agreement. Subsequent to DiBiasi's departure from the judge's chambers, Speiser informed the court that DiBiasi was a target of the grand jury. (T.150-7 to 8). Speiser further stated that no plea without an acknowledgement of guilt would be accepted from a client represented by DiBiasi because questions as to its validity might be raised if DiBiasi was ultimately indicted.

During June of 1979 DiBiasi again presented documents to the grand jury. (T.249-12 to 16). At that time, DiBiasi had secured counsel to represent him. In July of 1979, DiBiasi represented petitioner at sentencing. In August of 1979, DiBiasi was indicted. He was severed from the trial of his codefendants. Petitioner's name was mentioned in that trial. In December of 1980, DiBiasi pleaded guilty to a lesser charge.

ii.

The Jurisprudential Significance Of The Arguments To Be Raised Before This Court

Petitioner has selected a single issue to be raised before this Court. The issue relates to the failure of counsel and/or the prosecutor to disclose to petitioner that defense counsel was a target of a Federal Grand Jury investigation in the same Federal district as the trial and the adverse effect upon the representation which counsel afforded as the result of this status. It is petitioner's position that this status constituted an impermissible conflict, absent disclosure and a waiver of the right to conflict-free counsel. We believe that this issue has national significance in the context of the development of fair and uniform trial procedures designed to ensure the integrity of verdicts in criminal cases.

There exists a precedential void respecting the disclosure obligations of the criminal bar where a member thereof becomes aware that he is a target of a grand jury investigation and, therefore, under an investigation by a law enforcement agency with which he may be required to deal on behalf of a client. The majority of cases analyzing conflicts of interest have arisen in the context of multiple representation cases or in circumstances where the personal conflict of the attorney stems from a pecuniary interest in the ultimate disposition of the matter. Guidance to the bar as to the level of constitutionally required disclosure, where

an attorney is called upon to try a criminal cause in a federal district in which he is the knowing target of a grand jury investigation, is an issue ripe for determination by this Court. This question should not be resolved by experimentation. A criminal defendant has no means to perceive such a conflict absent voluntary disclosure by counsel. As was demonstrated below, "target status" clearly has the capacity to render an advocate ineffective because of his concern for his personal interest. It also raises the spectre of improper influence and intimidation by the prosecutor. Absent disclosure to the client and a knowing decision to proceed, which would effect a waiver of the right to conflict-free counsel, the air of uncertainty as to the loyalty of counsel renders any actions which he takes suspect. Because a criminal defendant will not discover the conflict until his cause has been t. ed, trials may be nullified because no clear rule of disclosure has been fashioned.

As importantly, this Court should fashion a rule of conduct pertaining to the obligations of a procecutorial agency where it is actively investigating an attorney who is involved in the trial of a criminal matter which falls within the jurisdiction of the agency. The prosecutorial agency involved in the instant case affirmatively limited the options available to petitioner in plea negotiations due to his

counsel's status. In Cuyler v. Sullivan, 466 U.S. 334 (1980), the inquiry obligations of the trial court and its general supervisory responsibilities in the context of multiple representation cases was settled. Sullivan also answered the issue as to the level of prejudice necessary to underpin the granting of a new trial on appeal where a criminal defendant fails to object to a conflict stemming from multiple representation at trial. The principles of analysis utilized in Cuyler are ripe for application to conflicts of the type in the instant case.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE ISSUE AS TO WHETHER AN ATTORNEY'S KNOWING STATUS AS THE TARGET OF A GRAND JURY INVESTIGATION IN THE SAME DISTRICT AS TRIAL IS AN ACTUAL CONFLICT WHICH MUST BE DISCLOSED TO THE CLIENT. THIS COURT SHOULD ALSO DETERMINE WHETHER THE PROESCUTOR AND THE COURT HAVE AFFIRMATIVE DUTIES OF INQUIRY AS TO WHETHER THE CONFLICT WAS DISCLOSED IN CIRCUMSTANCES WHERE THEY ARE AWARE OF

THE TARGET STATUS OF DEFENSE COUNSEL. AS IMPORTANTLY, THIS COURT MUST DETERMINE WHETHER THE PROSECUTOR'S DISCRIMINATION AGAINST COUNSEL WITH RESPECT TO PLEA NEGOTIATION ALTERNATIVES SUFFICIENTLY EVIDENCED AN ACTUAL CONFLICT IN THIS CASE AND CONSTITUTED AN ADVERSE AFFECT ON THE REPRESENTATION AFFORDED PETITIONER

Facts adduced at the evidentiary hearing below indicate that counsel at trial labored under a debilitating conflict of interest which was not disclosed to petitioner. Counsel became aware sufficiently in advance of trial to facilitate notice or withdrawal from the case that he was the target of a federal grand jury investigation in the same federal district as that in which trial was to occur. In fact, counsel was issued a grand jury subpoena substantially in advance of trial. Pursuant to that subpoena, counsel produced documents and intended to testify before the grand jury. Counsel was dissuaded from testifying by the Assistant United States Attorney who supervised the grand jury. The Assistant United States Attorney issued target warnings to counsel and suggested that he reconsider his decision to

testify. Counsel clearly surmised prior to trial that he would subsequently be indicted. Counsel also concluded prior to trial that the most prudent course was withdrawal from the case. Nevertheless, he remained in the case and did not disclose the conflict. Subsequent to trial, counsel by affidavit advised the court that he had not been able to give his undivided attention to defense of petitioner's cause. In addition, both the trial prosecutor and the court were aware at some point during counsel's representation of petitioner that counsel knew that he was a target of a grand jury sitting within the same office complex as trial and administered by the same United States Attorney's Office as that conducting trial. Neither the trial prosecutor nor the court undertook to ascertain whether counsel disclosed his problems and the debilitating emotional and psychological effects thereof. Indeed, no concern whatsoever was expressed relative to the detriment to petitioner.

As importantly, at least one Assistant United States Attorney was aware that during trial counsel made attempts to discuss his status within the grand jury investigation. Simply put, during trial counsel assumed dual roles in dealing with the United States Attorney as both advocate for petitioner and his own cause. Those separate interests were conflicting and deprived petitioner of counsel's

undivided attention and loyalty. Of greater significance is the admission of the trial prosecutor both in an affidavit and at the reluctantly conducted evidentiary hearing that a particular form of plea agreement, viz. a plea without an admission of guilt, would not be considered for petitioner because of his counsel's target status. The prosecutor expressed a concern that questions might thereafter arise as to the validity of the plea in the event that counsel was subsequently indicted. The demonstration of conflict and adverse affect upon representation could not be more clearly established than in this case.

It is our position that petitioner, due to concealment of the conflict, was deprived of his inter-related rights to conflict-free counsel and effective assistance of counsel. Both the prosecutor and trial counsel participated in denial to petitioner of an opportunity to exercise an intelligent choice in the selection of counsel. The general right to counsel incorporates the right to choose counsel with knowledge of all relevant information. Disclosure of all relevant information permits effectuation of the right to conflict-free counsel. Although counsel and the prosecutor were aware of counsel's status and should have perceived the pitfalls, no action was taken to advise petitioner to enable him to determine whether he was willing to accept the risks

of representation by conflicted counsel. During the course of trial, the court also became aware that a conflict of counsel interfered with his ability to provided untrammelled representation, viz. abridgement of his plea options. The court was obligated to immediately determine whether appellant had accepted counsel's representation with knoweledge that he risked prejudice due to counsel's status. Absent a waiver based on intelligent and informed acceptance of the risks, we submit that it must be presumed that appellant did not receive effective assistance of counsel. We believe that counsel is per se incompetent where he fails to disclose an actual conflict to his client which is not discoverable by independent means. Simply put, the exercise of customary skill requires that counsel recognize and resolve any personal conflict prior to assuming representation of his client.

In an opinion affirmed by the Third Circuit, the district court ruled that a claim of constitutional violation predicated on the non-disclosure of an actual conflict is to be analyzed uner the principles set forth in Cuyler v. Sullivan, 446 U.S. 334 (1980), viz. a demonstration of an actual conflict of interest and an adverse affect on the representation. That court stated that no actual conflict was demonstrated nor any adverse affect on the representation.

The district court then stated that in the absence of an actual conflict, petitioner's claims must be claim is analyzed under the standard set forth in **Moore v. United States, 432 F.2d 730 (3 Cir. 1970)**. More specifically, the district court stated that to prevail petitioner was required to demonstrate that counsel did not exhibit customary skill in the representation which he provided. Resolution of petitioner's claims is dependent upon further analysis by this Court of its decisions in **Cuyler** and **Wood v. Georgia, 450 U.S. 261 (1981)**. Particularly, this Court must fashion guidelines to be applied by courts in assessing whether a circumstance presents an actual conflict.

i.

Present Law As To Conflicts

a. **Holloway v. Arkansas - The Seminal Articulation Of Modern Conflicts Law**

The law in the area of conflicting interests evolved from cases involving joint representation of multiple defendants. In **Holloway v. Arkansas, 435 U.S. 475 (1978)**, this Court considered a case in which appointed counsel was required over objection to represent three criminal defendants in a joint trial trial. Relying on **Glasser v. United States, 315 U.S. 60 (1942)**, the **Holloway** Court began its analysis by stating that multiple representation is not per

se violative of the constitutional guarantee of effective assistance of counsel. That predicate statement was based on an awareness that multiple representation is not always a conflict and, in fact, may be beneficial to a common defense. 435 U.S. supra at 482. However, again specifically relying on Glasser, the Holloway Court ruled that it was error in the case before it to fail to appoint separate counsel over the objections of the defendants and counsel's statements that multiple representation was imprudent. In answering the question as to whether the error was sufficiently prejudicial to mandate reversal of the convictions, the Holloway Court ruled that "whenever a trial court improperly requires joint representation over timely objection, reversal is automatic." 435 U.S. at 488. (emphasis added). The Holloway Court rejected any notion that the defendant be required to demonstrate specific prejudice. Any such rule, stated the Holloway Court, "would not be susceptible of intelligent, even-handed application." 435 U.S. at 490. The Holloway Court added: "to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." (emphasis added).

b. Cuyler v. Sullivan - This Court Resolves The Issues Left Unanswered In Holloway v. Arkansas

This Court granted certiorari in Cuyler to consider recurring issues left unresolved in Holloway v. Arkansas, supra. Those unresolved issues were: (1) whether a trial judge must inquire into the propriety of multiple representation even though no party lodges an objection and (2) whether the mere possibility of a conflict of interest warrants the conclusion that the defendant was deprived of his right to counsel. With respect to the first issue, viz. the responsibility of the trial court to initiate an inquiry into the propriety of multiple representation, the Cuyler Court stated that a trial court ordinarily has no such responsibility. 466 U.S. at 346. The Court stated that "defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial." id. (emphasis added). Accordingly, "absent special circumstances...trial courts may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as may exist." 466 U.S. at 347. (emphasis added). The rule fashioned by the Cuyler Court is that "unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." Id.

With regard to the second issue, viz. whether the mere possibility of prejudice or conflict of interest due to multiple representation denies the defendant his Sixth Amendment right to effective counsel, the Cuyler Court undertook a multi-faceted analysis. The Cuyler Court observed that "a possible conflict inheres in almost every instance of multiple representation [and] a defendant who objects...must have the opportunity to show tht potential conflicts impermissibly imperil his right to a fair trial." 446 U.S. at 348. In regard to a presumption of prejudice, the Court stated:

> ...unless the trial court fails to afford such an opportunity [to show danger to the right to a fair trial] a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel. Such a presumption would preclude multiple representation even in cases where a common defense...gives strength against a common attack. [466 U.S. at 348]

It is apparent that the Cuyler Court was concerned that a presumption of prejudice would give rise to a proliferation of tactical decisions to fail to object at trial and, in the event of a conviction, to raise the issue on

appeal. And, since there is always a possible conflict, the utility of multiple representation would be completely nullified. To thwart this tactic, the Cuyler Court ruled that "in order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial [to multiple representation] must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." 466 U.S. at 348. The Cuyler Court was careful to state that it was not constructing a rule which required a demonstration of prejudice. The Court stated:

> [Once it is established that counsel] hd an actual conflict of interest, [courts will not] indulge in nice calculations as to the amount of prejudice attributable to the conflict...[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. [466 U.S. at 349-350] (emphasis added)

The rule in Cuyler, therefore, is that a defendant who fails to object to multiple representation at trial must demonstrate an actual conflict on appeal. Upon a demonstration of an actual conflct adversely affecting the

lawyer's performance, prejudice requiring reversal has been established. We emphasize that Cuyler did not analyze concealed personal conflicts such as that in the instant case.

c. Wood v. George - The Most Recent Statement Of This Court

In Wood v. Georgia, 450 U.S. 261, 101 S.Ct. 1097 (1981), this Court granted certiorari to consider the question of "whether it is constitutional under the Equal Protection Clause to imprison a probationer solely because of his inability to make installment payments on fines." lol S.Ct. 1100. The Court in Wood was concerned about aspects of the nature of the legal representation provided to petitioners. More specifically, the Court stated that the record suggested that the petitioners may be in their present predicament because of their counsel's divided loyalties. Petitioners in Wood had been represented since the time of their arrests by a single lawyer, including all parole and probation revocation hearings. None of them, however, paid nor expected to pay a fee. The employer of the petitioner provided the lawyer and also agreed that he would pay any fines and post any necessary bonds. Moreover, it was fairly apparent that heavier fines were imposed on petitioners because the trial court anticipated that the employer would be making payment. 101 S.Ct. at 1103. With respect to the

fines at issue, however, the employer failed to pay. Id. None of the petitioners had objected to the multiple representation. Sua sponte, the Wood Court observed:

> Since it was this decision by the employer [to refuse to pay] that placed petitioners in their present predicament, and since their counsel has acted as the agent of the employer, the risk of conflict of interest in this situation is evident. [101 S.Ct. at 1101]

In reaching its decision, the Wood Court expanded upon an issue present in Cuyler, namely the circumstances under which a court must inquire into potential conflicts. The Court stated that "the possibility of a conflict of interest was sufficiently apparent at the time of the [parole] revocation hearing to impose upon the court a duty to inquire further." [101 S.Ct. at 1104][1] The Wood Court vacated the judgment and remanded the case on due process grounds. Id. The Court utilized the due process clause because it was of the view that representation by conflicted counsel violated the petitioner's due process rights respecting the parole and probation hearing. The Wood Court instructed

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The Wood Court stated "[Cuyler] mandates reversal when the trial court has failed to make an inquiry" in such circumstances. 101 S.Ct. at 1104.

the state court "to hold a hearing to determine whether the conflict of interest that this record strongly suggests actually existed at the time of the probation revocation or earlier." Id.[2] The Court further stated:

> If the Court finds that an actual conflict existed at that time and that there was no valid waiver of the right to independent counsel, it must hold a revocation hearing tht is untainted by a legal representation serving conflicting interests. [101 S.Ct. at 1104] (emphasis added)

Under any reasonable interpretation of Wood, the law is presently that a demonstration of an actual conflict of interest and the lack of a waiver requires vacation of a conviction and new proceedings with conflict-free counsel.

ii

Counsel Labored Under An Actual Conflict Of Interest

The district court found that counsel was not laboring under a conflict of interest of the sort which must be disclosed to a client. The finding that no conflict existed

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[2] The possible conflict identified by the Wood Court was that it appeared that "counsel had been provided by [the] employer and was pressing a constitutional attack rather than making the arguments for leniency that might well hve resulted in substantial reductions in, or deferrals of, the fines." 101 S.Ct. at 1104. (emphasis added).

was reached despite the court's awareness that counsel filed an affidavit immediately after the trial stating that his concentration was divided at trial and that he realized prior to trial that he would not be able to provide zeal for petitioner's cause but decided against withdrawal. The district court also discounted unrefuted evidence that during trial counsel approached the prosecutor who supervised the grand jury investigation to discuss his status within that investigation. Most importantly, the court's decision was reached despite the district court's awareness that the trial prosecutor testified at the hearing that he would not consider a particular plea arrangement due to counsel's status. Indisputably, the total circumstances depict a conflict of the sort which is clearly constitutionally intolerable absent a waiver.

The actual conflict of interest of the sort herein was required to be disclosed to the client. Petitioner was deprived of a dynamic disputant. Counsel was hampered in his ability to represent petitioner both due to emotional and psychological factors and the prosecutor's unwillingness to deal with him due to his status. This fact, viz. the prosecutor's restriction of counsel's alternatives due to his status, establishes a clearly egregious conflict. Any position to the contrary is irrational.

iii.

Although No Adverse Affect Need Be Demonstrated It Is Clear That The Conflict Adversely Affected The Representation

The district court erroneously ruled that petitioner was required to demonstrate both an actual conflict and an adverse affect on the representation which he received. Appellant in our view was merely required to demonstrate an actual conflict. The court then ruled that even assuming the existence of an actual conflict it did not adversely affect the representation appellant received. At the outset, we emphasize that the difficult form of calculation required to determine prejudice or adverse affect gave rise to the rule in **Holloway** that upon demonstration of an actual conflict, no prejudice need be demonstrated. Such calculations are wholly insusceptible to evenhanded application. In this context, we iterate tht the "adverse affect" rule in **Cuyler** relates exclusively to claims raised subsequent to objected to acquiescence in multiple representation and is intended to prevent abuse of the appeal process. In cases where counsel conceals a personal conflict, no adverse effect need be demonstrated. As is clear from the discussion below, it is virtually impossible to quantify adverse affect in the instant context and any rule requiring such would be unworkable.

Nevertheless, it is clear that an adverse affect inhered in this case. Cf. United States v. Chronic, 675 F.2d 1126 (10 Cir. 1982), cert. gr. 103 S.Ct. 1182 (1983).

Notwithstanding the trial prosecutor's admission at the hearing tht he discriminated against counsel because of counsel's status, the court ruled that no adverse affect inhered. In essence, the district court predicated its ruling on its view that under no circumstances would a plea without an acknowledgement of guilt have been accepted. The basic reason for this position is that the court during its eight year tenure has never accepted such a plea nor had it "heard of such a plea in this district." The district court, in an attempt to fashion a negative ruling at any cost, basically determined that the prosecutor could not have committed the act of discrimination to which he admitted. It bears repeating that the Court in Holloway specifically sought to condemn this form of plainly inadequate analysis in fashioning the rule that no prejudice need be demonstrated in conflict cases. See United States v. Laura, 667 F.2d 365, 375 (3 Cir. 1981) (Stern, District Judge, dissenting). And, for analytical purposes, there is essentially no distinction between "adverse affect" and prejudice in cases involving concealed conflicts of a personal nature.

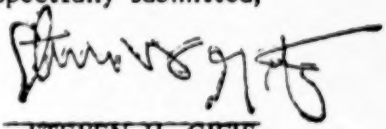
This Court in Cuyler intended that the "adverse affect" rule in multiple representation cases relate only to defendants who failed to object to a situation inherently fraught with potential conflicts and to situations within that form of representation such as the inability of counsel to cross-examine a particular witness as the result of a conflict in his representation of multiple defendants. The conflict and the adverse affect are in the inability to question the witness. The defendant need not demonstrate that he was harmed by the inability. Simply put, he need not establish that the witness' testimony would have materially aided his cause. He must merely demonstrate counsel's conflict and its concomitant adverse limitation of his alternatives.

In the instant case, the prosecutor has conceded that he limited counsel's alternatives in his representation of petitioner because of counsel's status. Counsel was, therefore, hobbled. Any such limitation, when it is unbeknownst to the appellant is an adverse affect on the representation. The defendant need not demonstrate that the form of disability resulted in prejudice. In the particular form of disability within the case we need not even undertake the adverse affect analysis since, unlike in multiple representation, petitioner was not alerted to the potential for conflict and had no opportunity to object.

CONCLUSION

For all the foregoing reasons, the writ of certiorari should be granted to review the final judgment of the United States Court of Appeals for the Third Circuit. That judgement should be vacated and a new trial ordered.

Respectfully submitted,



BY: STEVEN H. GIFIS



BY: ALAN DEXTER BOWMAN

DATED: November 14, 1983

Appendix

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5624

UNITED STATES OF AMERICA

V.

GABRIEL BRIGUGLIO,

Appellant

(Criminal 79-72-04 - D.N.J. - Newark)

District Judge: Honorable H. Curtis Meanor

Argued July 15, 1983

BEFORE: SEITZ, Chief Judge, SLOVITER, Circuit Judges, and LORD, District Judge.*

JUDGMENT ORDER

After consideration of the contention raised by appellant, to-wit, that the undisclosed actual conflict affecting trial counsel and the discrimination stemming from it deprived appellant of his fifth and sixth amendment rights to conflict-free counsel and effective representation, and essentially for the reasons given in the opinion of the district court, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

s/SEITZ
Chief Judge

ATTEST:

s/S.M.
Sally Mrvos, Clerk

DATED: July 18, 1983

*Joseph S. Lord, III, Judge of the United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5624

UNITED STATES OF AMERICA

v.

GABRIEL BRIGUGLIO,

Appellant

(Criminal No. 79-72-04 - D.N.J. - Newark)

SUR PETITION FOR REHEARING

PRESENT: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges, and LORD, District Judge.*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Collins J. Seitz,
Chief Judge

DATED: August 17, 1983

*Joseph S. Lord, III, Judge of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

SUPREME COURT OF THE UNITED STATES

No. A-269

GABRIEL BRIGUGLIO,

Petitioner,

V.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITITON FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 15, 1983.

s/William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 17th
day of October, 1983.

APPENDIX B

CONSTITUTION

Amend. 5

AMENDMENT V-CAPITAL CRIMES: DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

CONSTITUTION

Amend. 6

AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

83-903

No. _____

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In The

Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA,

-vs-

GABRIEL BRIGUGLIO,

Petitioner.

SUPPLEMENTAL APPENDIX FOR PETITIONER

STEVEN H. GIFIS
ALAN DEXTER BOWMAN
20 Nassau Street, Suite 203
Princeton, New Jersey 08542
(609) 921-0413

Attorneys for Petitioner

THE SUPERIOR APPELLATE PRINTING COMPANY
P.O. Box 383
Cranbury, N.J. 08512
Area Code 609
443-4202

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NOT FOR PUBLICATION

ORIGINAL FILED AUGUST 5, 1982

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CRIMINAL NO. 79-72

UNITED STATES OF AMERICA,

Plaintiff,

v. OPINION

GABRIEL BRIGUGLIO,

Defendant.

APPEARANCES:

W. Hunt Dumont, Esq.
United States Attorney
BY: Robert A. Weir, Jr.,
Asst. U.S. Attorney and
Kenneth Ballen, Esq.
Asst. U.S. Attorney

Alan Dexter Bowman, Esq.
Attorney for Defendant
Gabriel Briguglio

MEANOR, District Judge

This opinion is the consequence of an evidentiary hearing ordered by the Court of Appeals for the Third Circuit in **Briguglio v. United States, 675 F.2d 81 (3d Cir. 1982).**

Petitioner, Gabriel Briguglio, was convicted in this court in May 1979, along with Anthony Provenzano and Thomas and Stephen

Andretta, of violations of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1962 (1970). Briguglio was convicted of conspiracy to violate RICO and of one substantive count under that statute. He was given two concurrent seven year terms, which he is now serving. The full facts of that case are set forth in the opinion of the Court of Appeals affirming the convictions of Provenzano and the Andretta brothers. **United States v. Provenzano, 620 F.2d 985 (3d Cir.), cert. den. 449 U.S. 899 (1980).**

Briguglio was severed from the appeal in that case because the government moved before the Court of Appeals to disqualify his then appellate counsel. The motion to disqualify was remanded to this court, and, in a motion be granted. Counsel was disqualified and, subsequently, Briguglio's convictions were affirmed by Judgment Order dated November 17, 1980. **United States v. Briguglio, 636 F.2d 1211 (3d cir. 1980), cert. den. 451 U.S. 937 (1981).**

The claim presently before the court is that, since Briguglio's trial counsel, Thomas DiBiasi, was a target of a grand jury investigation in this district at the time of the Provenzano trial, he was an impermissible conflict of interest that requires vacation of Briguglio's convictions. The records of this court show that DiBiasi was indicted on August 14, 1979 along with two others in **United States v. Juliano, et al.**, Crim. No. 79-283. DiBiasi was severed for trial from his codefendants who were found guilty and whose convictions have now been affirmed. **United States v. Juliano, 661 F.2d 915 (3d Cir. 1981), cert. den. __ U.S. __ 71 L.Ed.2d 848 (1982).** Thereafter, on November 17, 1980, DiBiasi pleaded guilty to a superseding information charging him with a misdemeanor violation of **18 U.S.C. §657 (1976).** The gist of the charge was that DiBiasi aided and abetted the submission of false credit information to a savings and loan association for the purpose of influencing the

grant of a loan. On December 23, 1980, DiBiasi was sentenced to probation for three years and fined $1,000.

In its opinion requiring an evidentiary hearing, the Court of Appeals quoted the following passages from **Cuyler v. Sullivan**, 446 U.S. 335, 348 and 349-350 (1980):

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance...[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief. 675 F.2d at 82-83.

These are the standards by which I must be guided. It is, therefore, Briguglio's burden to show that DiBiasi was acting under an actual conflict of interest and that that conflict adversely affected his performance. If these requisites are met, prejudice need not be shown.

To establish an actual conflict of interest heavy reliance is placed on **United States v. DeFalco, 644 D.2d 132 (3d Cir. 1979)**. There an attorney was under indictment and engaged in plea bargaining while representing his client on appeal. In fact, only a few days before the appeal was submitted without oral argument, the attorney pleaded guilty to one of three indictments pending against him on a plea bargain that contemplated dismissal of the others. As a consequence of the guilty plea the attorney was suspended in this court at the time his client's appeal was submitted. The court of Appeals held that on these facts there was a conflict of interest as a matter of law and, absent waiver, the client was entitled to a fresh appeal with new counsel.

The facts in this case are vastly different from those in **DiFalco**. Here DiBiasi knew before the start of the **Provenzano** trial only that he was under grand jury investigation. He had responded to a grand

jury subpoena directed to his clients by delivering documents to the office of the United States Attorney. There was no indictment until long after the trial was over. It began on May 7, 1979 and concluded with the jury's verdicts on May 25, 1979. Sentencing took place on July 10, 1979--over a month before Dibiasi was indicted on August 14, 1979. Dibiasi had been informed during the trial that no action would be taken against him until the **Provenzano** matter had been concluded. Hence, there was no indictment at any relevant time and there clearly was no plea bargaining by DiBiasi.

DiBiasi has testified that he did not believe he would be indicted and did not fear that event until sometime in June 1979. Hence, he states, his potential criminal troubles did not adversely affect his representation of Briguglio. This assertion is somewhat contradicted by an affidavit executed by him on September 20, 1979 in which he states:

> I feel, however, due to the nature of the investigation which eventually led to my own

> indictment, that subconsciously, I was not in a position to give my client a total and proper defense and as a result of this, he may have been denied his right to competent counsel.

He excuses his affidavit statement by noting that it was drawn by successor counsel for Briguglio.

The conflict asserted because of DiBiasi's dual status as a grand jury target and a defense attorney opposing the same office that was investigating him holds forth two possible avenues of improper representation. First, the defense attorney could bargain away his client's rights in order to gain an advantage for himself. He could, for example, persuade his client to agree to a disadvantageous plea on an understanding with the prosecution that the client's plea would be a grade for leniency for him. If such a plea could not be entered, the defense attorney could "throw" the case on the understanding that by so doing he would be rewarded by having the prosecution "go easy" on him.

Second, the fact that the defense attorney is under grand jury investigation might make him so personally distraught that he would not be able to devote sufficient skill and attention to his client's cause. It should be noted that this latter potentiality would exist even if the investigating office were different from that being opposed by counsel under investigation.

The first of these possibilities is not asserted here. Such an event would necessitate a corrupt prosecutor as well as a corrupt defense attorney. I believe DiBiasi's statement that he did not expect to be indicted until sometime in June 1979 when he realized that he, as well as his former clients, was a serious subject of the grand jury's inquiry. there simply is no evidence that DiBiasi sought to "trade off" Briguglio for favorable consideration for himself. Furthermore, there was no opportunity for him to do so. At all times relevant to this matter, there was no charge pending against

DiBiasi and there was no plea bargaining with him. The government wisely and scrupulously avoided any discussion with Dibiasi pending completion of the Provenzano trial, except to inform him of the fact that no action would be taken on the matter in which he was under investigation until that case had been concluded.[1]

It is the second possibility--what the Third Circuit has called "inherent emotional and psychological barriers"--[2] that is being

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[1] There was another contact between Dibiasi and the government regarding the Juliano grand jury investigation that took place after Dibiasi had entered his appearance for Gabriel Briguglio on February 27, 1979. A grand jury subpoena, dated March 9, 1979, was directed to him requiring the production of records pertaining to various clients of DiBiasi's firm. DiBiasi produced the records but did not testify. This subpoena may have hinted to Dibiasi that he was a potential target. He claims that he did not realize he was a target until being so informed in June 1979. The Assistant United States Attorney in charge of the Juliano investigation states that dibiasi was informed of his status as a possible target in April 1979. I accept the latter statement as true. What is also true is that dibiasi did not consider himself to be in serious jeopardy of indictment until June 1979.

[2] United States v. DeFalco, 644 F.2d at 136.

pressed here. In support of this thesis various attacks are made upon the quality of DiBiasi's actions as defense counsel.

United States v. DeFalco is the only case cited to me in support of the proposition that Dibiasi, as a grand jury target and defense counsel in unrelated matters, was under conflict of interest. Yet as the court made clear, 644 F.2d at 137 n.5, it was the entire factual complex of that case upon which it rested its conclusion of a conflict as a matter of law. That complex encompassed three indictments, plus plea bargaining, plus a guilty plea. The **DeFalco** facts are a far cry from those here. In this case there was only a grand jury investigation. Many persons are investigated by grand juries and not indicted. There was no indictment of DiBiasi at any relevant time and there was, of course, no plea bargaining.

Under the circumstances here, I find that DiBiasi was not, at any time during his representation of Briguglio, acting under an

actual conflict of interest. He was not opposing, on his own behalf, the same prosecutorial office that was representing the United States in the case against his client. At no relevant time was there a case against him in which he could oppose the government. At best, there was only the possibility of a future conflict. That conflict never arose, because by the time DiBiasi was indicted he had ceased his representation of Briguglio.

The above finding of no actual conflict on the part of DiBiasi would require that the attacks on the adequacy of his representation be judged by the standard of "customary skill and knowledge" set forth in **Moore v. United States**, 432 F.2d 730, 736 (3d Cir. 1970). for the reasons which follow, I find that DiBiasi amply met the **Moore** standards. Moreover, assuming, arguendo, that an actual conflict existed, it had no adverse affect on DiBiasi's performance. The subsequent discussion of the claimed inadequacies of DiBiasi's representation will be couched in terms based

on this arguendo assumption, on the understanding that that discussion also encompasses a finding of compliance with the **Moore** standard.

As noted above, various attacks are made upon the adequacy of DiBiasi's representation. I agree with Chief Judge Seitz in his dissenting opinion in **Defalco** that in a case such as this both inadequate representation and prejudice should be shown, since the reasons for presuming prejudice in joint representation cases do not exist here. However, as I read the opinion remanding this case for an evidentiary hearing, the Court of Appeals had translated the rules governing cases of joint representation to this case. Thus, if there was inadequate representation, prejudice need not be established as a prerequisite to relief.[3]

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[3] In joint representation cases involving privately retained attrneys the New Jersey Supreme court conclusivel presumes prejudice, absent waiver. **State v. Bellucci, 81 N.J. 531 (1980); State v. Land, 73 N.J. 24 (1977).** The rule has been modified in the case of representation by public defenders from the same office. In that event there must be both

It is claimed that DiBiasi's status as a grand jury target impaired his client's ability to plea bargain. Trial counsel for the government in the Provenzano case was Jeffrey Speiser. The jury began its deliberations on May 23, 1979. While the jury was deliberating DiBiasi had a discussion with Speiser concerning a possible guilty plea from Briguglio. A meeting was held in my chambers on this subject. Present with me were Speiser, Jo Anne Alderstein, associate counsel for the government, Robert Stewart, head of the Newark Strike force, and DiBiasi. It was clear that Briguglio would not admit his guilt and that DiBiasi wanted to discuss an Alford plea.[4]

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a potential conflict of interest and a significant likelihood of prejudice. State v. Bell, __ N.J. __, No. A-35/117 (July 1, 1982).

[4] North Carolina v. Alford, 400 U.S. 25 (1970) in which the Supreme Court held that it was constitutionally permissible to accept a guilty plea from a defendant who maintains his innocene as long as the defendant intelligently concluded that the entry of the plea was in his best interests and it ws demonstrated on the record that the prosecution had strong evidence of guilt.

DiBiasi also wanted to discuss a sentence bargain. The discussion was brief. The plea conditions were not acceptable to the government.

After DiBiasi left the room, Speiser informed me that DiBiasi was under grand jury investigation in this district. That was the first time I knew of it. Later, in an affidavit executed May 29, 1981, Speiser stated:

> After the meeting ended, Mr. DiBiasi left the room. I remained in Judge Meanor's chambers but I do not recall who else was in the room. I informed Judge Meanor that Mr. DiBiasi was under investigation by the United States Attorney's office and there was a possibility that the investigation would lead to an indictment. I informed Judge Meanor of this fact in order to explain why the United States Attorney's Office would not accept a plea of guilty without an acknowledgement of guilt. I explained to Judge Meanor that if such a plea was accepted and Mr. DiBiasi was later indicted there might be a question as to the validity of the plea. I did not tell Judge Meanor the nature of the substance of the investigation of Mr. DiBiasi.

The claim that DiBiasi's ability to plea bargain in behalf of his client was impaired by his status as a subject of a grand jury

investigation is supported by an admission made by government counsel during oral argument of the appeal when, under prodding by the court, counsel stated that in the matter of plea bargaining Briguglio was treated differently. As I understand the present argument, DiBiasi is said to have been thus rendered inadequate in the matter of plea negotiation. This inadequacy, it is said, in turn leads to vacation of Briguglio's convictions irrespective of the fact that Briguglio was not prejudiced--i.e., he advanced plea conditions that would not have been acceptable in any event.

Before dealing with this issue, I must express my disturbance with the manner in which the question of plea bargaining entered this case. The subject was raised for the first time in Briguglio's initial brief in the Court of Appeals. It was not raised before me in any prior proceeding. On July 1, 1981, I

filed a 15 page opinion dealing with all the issues raised and impairment of the ability to plea bargain was not among them.

In its appellate brief the government, for some reason unknown to me, did not inform the Court of Appeals that the plea bargaining issue was then being raised for the first time. Instead, it chose to meet the issue with a reference to facts outside the record. This issue became the focal point of the oral argument on appeal and seems to have been the issue that most greatly concerned the Court of Appeals.[5] The opinion of that Court in this case fails to note that the plea bargaining issue was not raised in the district court. I find this odd, because any discussion of this question was noticeably absent from my opinion denying the petition without an evidentiary hearing. Surely, someone connected with the appeal should have realized that I would not

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5 I have both read a transcript of the oral argument of March 3, 1982 and listened to a tape of that argument. Listening to the tape is more helpful as I am able to recognize the voices of the judges who composed the panel.

have ignored the issue had it been projected. Nonetheless, despite my distaste for the manner in which the question arose, I am under a mandate to deal with it.

Despite Speiser's affidavit and the unfortunate admission during oral argument before the Court of Appeals, it is apparent that DiBiasi's ability to plea bargain for Briguglio was in no way affected by the ongoing grand jury investigation. The present record is absolutely clear that Speiser and DiBiasi, before the jury retired, had had plea discussions, each of which DiBiasi rejected. Speiser had no authority to accept a plea. He could recommend its acceptance to Robert Stewart, head of the Newark Strike Force. Stewart, in turn, would have had to clear a plea with Department officials in Washington.

The testimony of Speiser and Stewart makes it plain that no Alford plea from Briguglio would have been accepted. The government insisted on an admission of guilt. Briguglio would not admit guilt and so

testified during the present proceeding. Other details of a plea bargain, such as a limit on sentence or a plea to an information, were never discussed, except perhaps in passing, because the initial requisite--an admission of criminal responsibility--could not be met.[6] In fact, Stewart and Speiser testified that late in the trial a plea inquiry was made on behalf of Provenzano, but before the brief plea discussion about Briguglio took place in my chambers. Provenzano wanted a sentence bargain for three years. His attorneys were told by Speiser that any sentence bargain would have to be "somewhat in the nature of five years or more." Speiser also told Provenzano's counsel that Provenzano would have to admit his guilt. Counsel stated that they would consult

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6 As of this writing I have been a judge of this court for one month shy of eight yers. During that time I have probably taken several hundred guilty pleas. I have never heard of such a plea in this district. In addition, only once, under circumstances impossible to repeat, have I seen the government sentence bargain. I understand that on some rare occasions sentence bargaining has taken place before other judges.

Provenzano and get back to Speiser. Stewart checked with Washington and was told that the plea offer by Provenzano was unacceptable.

It is readily apparent that without an admission of criminal responsibility, which Briguglio refused to make, a plea from him was an impossibility. The requirement of an admission of criminal responsibility as a condition of a plea bargain had nothing to do with Dibiasi's status as a grand jury target. This record shows without doubt that an **Alford** plea from Briguglio was impossible under any cricumstances Dibiasi could not be rendered inadequate to accomplish the impossible.[7]

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[7] A defendant who cannot strike a plea bargain with the government is not precluded from avoiding trial. He could offer a plea of **nolo contendere** to the indictment; he could plead guilty to the indictment; or he could offer an **Alford** plea to the indictment. I have had defendants, who would notmeet the government's condition of cooperation as an ingredient of a plea bargain, plead guilty to the entire indictment. Nolo pleas are opposed as a matterof course by the government. Absent a plea bargain, there must be a plea to the entire indictment, for the court has no power to plea bargain, and only with the government's consent can a count not the subject of a plea be dismissed. Briguglio

There are several other claimed inadequacies on DiBiasi's part. one is the failure to have Briguglio testify in his own behalf. Briguglio testified to the effect that he wanted to testify, but was persuaded not to do so by DiBiasi. DiBiasi has testified that, after pointing out the pitfalls that might be encountered on cross-examination, he left that decision to his client. dibiasi also states that it was the consensus among defense counsel that they had an excellent chance for a favorable verdict, and did not want to take any significant risk of improving the government's case by defense testimony. I believe this latter assertion to be correct. The entire case hinged on the credibility of a nefarious character named Ralph Picardo and there was very little corroboration of his version of events. Picardo was very ably and very effectively cross-examined and it was by

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never offered any of these alternatives. Nor would it have been in his interest to do so. A plea to the two counts of the indictment in which he was charged would hve brought about exposure of 20 years on each count.

no means unreasonable to expect that the jury probably would not accept him as a credible witness.

I do not believe that DiBiasi directed or ordered Briguglio not to testify. I accept his testimony that he left the decision to the defendant after thoroughly explaining the risks. Provenzano and Thomas Andretta had criminal records nd did not testify. Stephen Andretta and Briguglio had no prior record. However, it is not uncommon for a defendant with no record not to testify. I have seen it happen many times. I accept Dibiasi's version that he left the ultimate decision whether to testify to Briguglio because that is the usual course of events and would be the expected conduct of a lawyer participating in the decision whether a defendant should testify. Therefore, I find that the decision not to testify was Briguglio's own. I also find that it was an intelligent one under the circumstances, a description of which follows.

Two checks were put in evidence that bore Briguglio's fingerprints. Picardo testified that they were payoff checks. As to the earlier check, Briguglio had no explanation as to how his fingerprints came to be there. He did have an explanation as to the second check. He claims that he met Mrs. Thomas Andretta at a gas station and that she informed him that she had a check to deliver to her brother-in-law, Stephen Andretta at the Chateau Renaissance, a restaurant which Provenzano frequented. Since Briguglio was going to pass that restaurant in a few minutes, he offered to deliver the check for her and his offer was accepted. Mrs. Thomas Andretta was in court throughout the trial. there is no evidence that she would have corroborated Briguglio's testimony. Since her availability easily could have been made known to the jury, her failure to verify this story could have been most damaging.

There also probably is an additional reason why Briguglio did not testify which was not mentioned at the hearing on this matter. It is obvious to me, since I was the trial judge in the Provenzano prosecution, that the defendants had determined to put on a united front. The case was tried by all defendants on the credibility of Picardo and the paucity of evidence corroborating him. No defendant attempted anything to help himself at the expense of implicating others.

Had Briguglio testified as outlined above, that testimony would have implicated Stephen Andretta directly and his brother indirectly, for it must be remembered that Picardo testified that the check Briguglio claims he delivered to Stephen Andretta as a favor was in fact a pay-off check procured in extortion of Seatrain.

Since I find that Dibiasi left the decision whether to testify to Briguglio after an adequate explanation of the dangers inherent in cross-examination, there can be no legitimate claim of inadequacy on his part.

It is asserted that DiBiasi refused to put on character witnesses that Briguglio desired. DiBiasi testified that Briguglio had been mentioned in newspaper stories as having been involved in the 1975 disappearance of Jimmy Hoffa and that he was afraid that this

would be brought out on cross-examination of character witnesses. This was not an unfounded fear. See Michelson v. United States, 335 U.S. 469 (1948) and United States v. Apfelbaum, 621 F.2d 62, 65 (3d Cir. 1980) in which a ruling was upheld that extended permission to the government to cross-examine a character witness on the basis of a newspaper story. Under these circumstances, DiBiasi cannot be labeled inadequate for not producing character witnesses. Furthermore, there is no proof before me that Briguglio had character witnesses willing to testify for him.

Petitioner asserts that DiBiasi was not sufficiently alert to avoid jury confusion between him and his deceased brother,

Salvatore Briguglio. Salvatore was deeply involved in the criminal enterprise that underlay the Provenzano case and would have been a defendant had he lived. There is no merit to this agreement. The jury fully understood that it was Gabriel, not Salvatore, who was on trial, and the record will not support the claim that the jury was misled into believing that actions of Salvatore were those of the defendant.

Finally, we come to the last of the claims of inadequacy on the part of DiBiasi. Criticism is leveled at his cross-examination of Ralph Picardo. The gist of the indictment in the Provenzano matter was that the defendants, by reason of their domination over Teamsters Local 560, extorted money from

Seatrain Lines, Inc. in exchange for labor peace. DiBiasi asked Picardo if his client would insure labor peace "in and of himself" to which he got surprise affirmative answer. It was a logical question to ask since, as Picardo knew, and as was brought out at trial, Gabriel Briguglio was not connected with Local 560. I do not believe that DiBiasi can be said to be inadequate because of this one question.

It is also contended that DiBiasi prematurely terminated his cross-examination of Picardo. This, simply, is not true. It must be pointed out that DiBiasi was fourth and last on cross and he had been preceded by three extremely able defense lawyers. Most of the work had already been done by the time DiBiasi began his examination and repetition of previous cross would not have been good tactics and undue repetition would not have been allowed. No fair reading of the record can support the conclusion that there was anything inadequate about DiBiasi's cross-examination of Picardo.

It is my conclusion about the criticisms now leveled at this petitioner's former counsel are totally unjustified. It is my finding that DiBiasi's representation of Gabriel Briguglio was more than adequate and in fact, exceeded the standard of average competency.

For the reasons set forth in this opinion, the present petition will be dismissed. The court will enter its own order.

DATED: August 5, 1982